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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CLINCHFIELD COAL COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR and JOHN A. TAYLOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

This petition for a writ of certiorari asks the Court to resolve two questions deferred in *Pittston Coal Group v. Sebben*, 109 S. Ct. 414 (1988).

1. Does 30 U.S.C. § 902(f)(2) require a mine operator to pay black lung disability benefits to certain former employees who do not have black lung disease or any related disability.

2. If 30 U.S.C. § 902(f)(2) prohibits a coal mine operator from defending a black lung claim by proving that a former employee does not have black lung disease or any related disability, then does 30 U.S.C. § 902(f)(2) violate the property rights of mine operators under the Due Process Clause of the Fifth Amendment to the Constitution of the United States by requiring them to pay benefits to certain black lung claimants absent any valid reason.

LIST OF PARTIES AND RULE 29.1 STATEMENT

John A. Taylor is a claimant for benefits under the Black Lung Benefits Act. He was the petitioner below and is a respondent here. The Clinchfield Coal Company ("Clinchfield") is the mine owner that last employed Taylor. Clinchfield was the respondent below and is the petitioner in this Court. The Director, Office of Workers' Compensation Programs, is the administrator of the black lung program and is a statutory party-in-interest in black lung claims. 30 U.S.C. § 932(k).

Clinchfield is a wholly-owned subsidiary of The Pittston Companies.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Clinchfield Coal Company respectfully petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 895 F.2d 178. (App. 4a-16a.) The order of the court of appeals denying petitions for rehearing filed by Clinchfield and the Government is unreported. (App. 1a.) The decision and order of the Benefits Review Board, United States Department of Labor, is unreported. (App. 17a-19a.) The Decision and Order of the Administrative Law Judge ("ALJ") — Rejection of Claim is unreported. (App. 20a-32a.)

JURISDICTION

The judgment of the court of appeals was rendered on February 5, 1990. The court of appeals enlarged the time for filing petitions for rehearing to and including March 16, 1990, (App. 2a-3a), and timely petitions were filed by Clinchfield and the Government. On April 20, 1990, the petitions for rehearing and the Government's suggestion for rehearing en banc were denied. (App. 1a.) This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following authorities are reprinted in the Appendix:

1. The Fifth Amendment to the Constitution of the United States. (App. 33a.)

2. Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988). (App. 34a.)

3. Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988). (App. 35a-36a.)

4. Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. § 923(b) (1988). (App. 37a-38a.)

5. Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988). (App. 39a.)

6. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1989). (App. 40a-42a.)

7. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1989). (App. 43a-45a.)

STATEMENT OF THE CASE

A. Background

In *Pittston Coal Group*, 109 S. Ct. 414, this Court invalidated a component of the U.S. Department of Labor's ("DOL") black lung "interim presumption" because it violated section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2). The offending provision in the DOL rule prohibited the invocation of this presumption by a claimant who established the existence of pneumoconiosis ("black lung" disease) by x-ray, biopsy, or autopsy evidence, unless it was also proven that the miner was employed in coal mine work for at least ten years. 20 C.F.R. § 727.203(a). A comparable "interim presumption" written by the Social Security Administration ("SSA")[1] permits invocation by a shorter term miner. 20 C.F.R. § 410.490(b). Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2), states, "Criteria applied by the Secretary of Labor . . . shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973 [with SSA] . . . ." Because DOL's ten-year rule is more restrictive than SSA's rule, this Court invalidated the former.

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[1] SSA's interim presumption was promulgated by the agency in 1972, for application in all black lung claims filed prior to July 1, 1973, and certain claims filed prior to January 1, 1974. 20 C.F.R. § 410.490(b). DOL's interim presumption was promulgated in 1978, for application in (1) claims then pending at DOL, (2) all claims previously denied by DOL, (3) certain claims previously denied by SSA, and (4) all new claims filed prior to DOL's congressionally mandated promulgation of new permanent eligibility regulations. 20 C.F.R. § 727.203; 30 U.S.C. §§ 902(f)(2), 945. DOL's new regulations became effective on April 1, 1980, and are applicable to all claims filed on or after that date. 20 C.F.R. Part 718 (1989). Approximately 424,000 claims were subject to review under the DOL presumption. *Problems Relating to the Insolvency of the Black Lung Disability Trust Fund: Hearings Before the Subcomm. on Oversight of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 186 (1981). It is estimated that from 3,000 to 7,000 of these claims are still active.

There are several other differences between the two interim presumptions. In a case consolidated by this Court with *Pittston Coal Group*, the Fourth Circuit struck down not only DOL's ten-year rule, but also perceived differences between the DOL and SSA presumptions on the rebuttal side. *Broyles v. Director, Office of Workers' Compensation Programs*, 824 F.2d 327, 329 (4th Cir. 1987), *aff'd in part sub nom. Pittston Coal Group*, 109 S. Ct. at 425. The DOL presumption may be rebutted expressly by proof that the miner does not or did not have black lung disease or that the miner's disability or death was not, at least in part, related to coal mine employment. 20 C.F.R. § 727.203(b)(3), (4). Noting that the SSA rule did not expressly provide these rebuttal possibilities, the Fourth Circuit invalidated DOL's rebuttal rules under 30 U.S.C. § 902(f)(2). *Broyles*, 824 F.2d at 329.

In this Court, the mine operator petitioners in *Pittston Coal Group* and the Solicitor General also sought review of the Fourth Circuit's invalidation of DOL's rebuttal rules. Broyles, however, in briefs and at oral argument, conceded the validity of DOL's rebuttal rules, explaining that they were authorized by the Act apart from the language of 30 U.S.C. § 902(f)(2).[2] Consequently, this Court held: "Respondents' concession on the rebuttal provisions means that we are not required to decide the question of their validity [or the related due process questions raised by petitioners]." *Pittston Coal Group*, 109 S. Ct. at 423. In remanding *Broyles* to the Fourth Circuit, this Court instructed the court below to apply "criteria no more restrictive than § 410.490 only as to the affirmative factors for invoking the presumption of entitlement, and not as to the rebuttal factors, the validity of which respondents have conceded." *Id.* at 424.

[2] *See, e.g.*, Official Transcript, Proceedings Before the Supreme Court of the United States, *Pittston Coal Group v. Sebben* at 31-35 (Consolidated Nos. 87-821, 87-827, and 87-1095) (U.S. Oct. 3, 1988).

In John Taylor's case, the Fourth Circuit revived *Broyles* to invalidate DOL's "extra" rebuttal provisions, thus prohibiting the denial of Taylor's claim even though Taylor does not have black lung disease or any related disability. A second Fourth Circuit panel reached approximately the same result on the same day. *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir.), *petition for cert. filed*, 58 U.S.L.W. __ (U.S. __, 1990) (No. 90-___).[3]

Clinchfield files this petition for a writ of certiorari to seek a return to reason in this program.

B. John Taylor's Claim

Taylor's claim was originally filed on November 3, 1976, and was subject to review under the DOL interim presumption after enactment of the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978). Following trial, the ALJ issued a decision and order denying benefits.[4] (App. 20a-32a.) The ALJ invoked the DOL interim presumption in light of arterial blood gas test results meeting the criteria published in DOL's rules. 20 C.F.R. § 727.203(a)(3). Turning to the rebuttal inquiry, the ALJ found most persuasive substantial medical evidence proving (1) that Taylor did not suffer from pneumoconiosis to any degree and (2) that Taylor's abnormal blood gas results were due exclusively to obesity and the effects of a long history of cigarette smoking. Since DOL's presumption is rebutted by proof that the miner does not have pneumoconiosis (section 727.203(b)(4)) or any related disability (section 727.203(b)(3)), it was rebutted in

[3] The Consolidation Coal Company has announced its intention to petition for certiorari as well.

[4] DOL black lung claims are adjudicated in accordance with the procedures for adversary litigation contained in the Longshore Act, 33 U.S.C. §§ 901-950, *incorporated in part by reference into* 30 U.S.C. § 932(a). *See Pittston Coal Group*, 109 S. Ct. at 424. SSA's black lung claims are adjudicated in accordance with the adjudicatory provisions of the Social Security Act, 42 U.S.C. §§ 404-408, *incorporated in part by reference into* 30 U.S.C. § 923(b).

this case. The Benefits Review Board affirmed. (App. 17a-19a.)

In reliance on its prior decision in *Broyles* and this Court's decision in *Pittston Coal Group*, the Fourth Circuit reversed and remanded. The court held that since the SSA presumption could not be rebutted even if the miner did not suffer from black lung disease or if the miner's total disability was unrelated to mining exposure, DOL's rebuttal rules were more restrictive than SSA's and thus not valid.[5] The court's conclusions are based exclusively on the reasoning that the DOL rule has extra rebuttal provisions not in the SSA rule. The court notes its disagreement with the contrary holding of the Sixth Circuit in *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). Chief Judge Ervin dissented stating:

> It seems to me that by adopting the views of the Third and Sixth Circuits concerning these murky and confusing regulations we do less violence to congressional intent, and avoid both upsetting the statutory scheme and raising due process problems. To preclude rebuttal with evidence that the miner either does not have pneumoconiosis or that his total disability did not arise out of coal mine employment is unacceptable to me.

Clinchfield Coal, 895 F.2d at 184 (Ervin, C.J., dissenting). Petitions for rehearing filed by the Government and Clinchfield were denied. (App. 1a.)

[5] Specifically, the court below held that rebuttal would never be permissible on the grounds that the miner did not have black lung disease. 895 F.2d at 183. The court also invalidated the "disability causation" prong of the DOL rule (section 727.203(b)(3)), but remanded for review under SSA's rule at 20 C.F.R. § 410.416, believing, apparently, that the DOL rule and SSA rule were roughly equivalent in this regard. The Fourth Circuit is, however, clearly wrong in drawing this equivalency. Labor's (b)(3) provision addresses the cause of a miner's total disability. SSA's section 410.416 addresses the cause of the miner's disease. The two matters are wholly independent elements, and the practical effect of the Fourth Circuit's disposition is simply to prohibit the defense from rebutting on the basis of proof that the miner is not disabled in any part due to coal mine employment related lung disease. 895 F.2d at 179 n.1. Shortly after its decision here, the Fourth Circuit recognized that its approach to (b)(3) rebuttal made no sense. *Robinette v. Director, Office of Workers' Compensation Programs*, No. 88-1144 (4th Cir. Apr. 27, 1990) (unpublished). The remands in this case and in *Dayton v. Consolidation Coal Company* are clearly pointless, and the Fourth Circuit so noted in *Robinette*, slip op. at 8 n.9.

REASONS FOR GRANTING THE WRIT

The continuing inability of the courts of appeals to agree on the meaning and validity of the Department of Labor's interim presumption has been intolerable for the industries that must pay the cost of approved black lung benefit claims. Equally intolerable is the premise, embraced by both the Fourth and Seventh Circuits, that in black lung claims our legal system has no interest in the truth. Thousands of claims have lingered in litigation for a decade or longer as the courts, the agency and the private parties try to extract reason and guidance from an ambiguous and contradictory statute, a tangled maze of SSA and DOL regulations and the elusive congressional compromises that produced it all.

This Court now has before it four petitions for certiorari[6] each urging a final reconciliation of the diverse views of the courts of appeals. Each case presents a different theory and approach, and each produces different consequences. A *final* resolution is required and Clinchfield respectfully urges this Court to grant certiorari here and to consolidate all of the cases so that these matters may be finished.

[6] In addition to this case, petitions have been filed in *Peabody Coal Co. v. Hubert Taylor*, No. 89-1696, *Pauley v. Bethenergy Mines Inc.*, No. 89-1714, and *Consolidation Coal Co. v. Dayton*, No. 90-_____.

I.
THE CIRCUITS DISAGREE

It is not necessary to burden the Court with a lengthy discussion of the circuit conflicts. They are clear. In this case, the Fourth Circuit invalidated 20 C.F.R. § 727.203(b)(3), (4) on the grounds that these regulations violate 30 U.S.C. § 902(f)(2). The twist in John Taylor's case is that here the presumption was invoked by blood gas tests, a method of invocation not available under SSA's rule. *Compare* 20 C.F.R. § 727.203(a)(3) *with* 20 C.F.R. § 410.490(b). The Fourth Circuit felt that the method of invocation did not matter. 895 F.2d at 182. ("[W]e should say that we think it is a matter of indifference under which set of regulations the presumption arises . . . .") The Fourth Circuit's holding is, in effect, that the SSA rebuttal rules simply apply in DOL's claims, except to the extent that DOL's rules may be more favorable to the claimant — in which case a mix and match approach is proper. The Fourth Circuit duly noted its disagreement with the decisions of the Third and Sixth Circuits. *Id.* at 183-84 & n.2.[7]

The Seventh Circuit also struck down DOL's rebuttal rules, but in a somewhat different way. *Hubert Taylor v. Peabody Coal Co.*, 892 F.2d 503 (7th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 2, 1990) (No. 89-

[7] The second case espousing the view of the court below is *Dayton v. Consolidation Coal Co.*, 895 F.2d 173 (4th Cir. 1990). There, the claimant invoked the presumption on ventilatory study evidence and rebuttal was proven under DOL rebuttal section 727.203(b)(2) and (b)(4) because the miner was not disabled by anything and also did not have pneumoconiosis. The fact that SSA's section 410.490(c)(2) rule bears considerable resemblance to DOL's (b)(2) rule was of no consequence to the court. 895 F.2d at 175. The decision in *Dayton* defies reason and goes far beyond any agency rules. The determination of the Fourth Circuit to prohibit mine operators from defending black lung claims on any basis is remarkable and it is a central reason why the consolidation of the Fourth Circuit cases with those already before the Court is essential.

1696). Focusing on language in the DOL rule requiring the consideration of all relevant medical evidence, the Seventh Circuit held that the absence of similar language in SSA's rule implied a breach of the restrictivity prohibition in 30 U.S.C. § 902(f)(2). 892 F.2d at 506-07. The Seventh Circuit noted its disagreement with the Sixth Circuit. *Id.* at 506.

The Third Circuit and the Sixth Circuit sustained the validity of DOL's rebuttal rules post-*Pittston Coal Group. Bethenergy Mines Inc. v. Director, Office of Workers' Compensation Programs*, 890 F.2d 1295 (3d Cir. 1990), *petition for cert. filed*, 58 U.S.L.W. 3725 (U.S. May 7, 1990) (No. 89-1714); *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195 (6th Cir. 1989). The Sixth Circuit held that medical evidence is properly considered under DOL's rebuttal rules and that these rules are valid. *Milliken*, 866 F.2d at 202 & n.3.

The Third Circuit's decision is focused more narrowly on DOL rebuttal section 727.203(b)(3). Noting an absence of decisional law under SSA's rule, the Third Circuit held that the regulatory cross-references in SSA's rebuttal section 410.490(c) would have no meaning unless SSA intended to permit rebuttal on the basis of proof that the miner's disability did not arise at least in part from coal dust related lung disease. 890 F.2d at 1302. DOL's rule was, thus, simply more explicit but not more restrictive, and accordingly, did not violate the restrictivity prohibition of 30 U.S.C. § 902(f)(2). *Id.* The Third Circuit noted the conflict between the Sixth and Seventh Circuits. *Id.* at 1303.

II.
THE DECISION BELOW IS CLEARLY WRONG

A. The Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (1988), cannot accommodate an interpretation requiring the payment of employer funded benefits to a miner who has no black lung disease or related disability. The Act's sole purpose

is the establishment of a federal workers' compensation program to provide benefits to coal miners and their families on account of total disability or death due to black lung disease. 30 U.S.C. § 901(a). It is true that Congress liberalized the Act in 1972[8] and 1978[9] to make it easier for claimants to obtain an award. It is also true, as this Court has observed, that in 1978 Congress established a temporary period during which DOL's black lung eligibility criteria would not be more restrictive than SSA's 1972 criteria to maximize the number of claims that would be paid. *See Pittston Coal Group*, 109 S. Ct. at 421.

To accomplish these objectives, Congress generally cast the burden of persuasion on ultimate facts on claim defendants, and enacted other presumptions and rules of proof allocating the risk of uncertainty to the Government or the mine owner. There is, however, no indication in the statute or elsewhere that Congress had the hidden purpose of transforming the Act into a retirement, general disability or life insurance program for coal miners. At all times, the Act retained the critical provisions mandating a connection between disability or death and black lung disease as a predicate to the imposition of liability.

In authorizing the Secretary of Labor to write eligibility regulations, the Act plainly states that those regulations must be designed to compensate total disability due to pneumoconiosis.[10] 30 U.S.C. § 902(f)(1)(A), (D). Certainly, 30 U.S.C. § 902(f)(2) does not expressly amend this basic premise and

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[8] *See* The Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 150 (1972).

[9] *See* The Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, 92 Stat. 11 (1978), and the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978).

[10] Pneumoconiosis is defined by the Act to mean "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b).

its reference to SSA "criteria" should be construed in accordance with the premise.

Section 422(c) of the Act also provides: "[N]o benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis . . . which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator . . . ." 30 U.S.C. § 932(c); *see id.* § 932(h). The Fourth Circuit's opinion cannot possibly square with section 422(c). Section 423 of the Act obligates a mine operator to purchase insurance providing compensation for total disability or death due only to pneumoconiosis, not something else. 30 U.S.C. § 933(a); *see also id.* § 932(a). If the Fourth Circuit is correct, the insuring arrangements entered into could prove worthless and are surely inadequate. Section 421 of the Act obligates the Secretary of Labor to approve state workers' compensation programs, providing adequate benefits for total disability or death due to pneumoconiosis, and to release mine operators in an approved state from compliance with the federal Act. 30 U.S.C. § 931. No state workers' compensation program even arguably could comply with the program envisioned by the Fourth Circuit. Section 413(b) of the Act obligates a trier of fact to consider the significance of all relevant medical evidence, specifically mentioning the types of evidence relevant to determining whether the miner is totally disabled or died due to pneumoconiosis. 30 U.S.C. § 923(b). Under the Fourth Circuit's approach, the provision must be amended to mean that the only evidence that is relevant is evidence favoring an award. Evidence tending to defeat a non-meritorious claim is irrelevant.

In *Pittston Coal Group*, this Court reallocated burdens of proof in certain claims. Nothing in the decision purports to change the basic purpose of the Act. The Fourth Circuit's extension of *Pittston Coal Group* here overrides the limits of this statute. This Court has observed, "'in expounding a statute, we [are] not . . . guided by a single sentence or member

of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *Massachusetts v. Morash*, 109 S. Ct. 1668, 1673 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)). The words "not more restrictive criteria" do not stand alone in the Act. As a part of the whole they must be construed to have some logical connection with the whole. *See American Tobacco Co. v. Patterson*, 456 U.S. 63, 71 (1982) ("statutes should be interpreted to avoid untenable distinctions and unreasonable results whenever possible"). The Fourth Circuit's interpretation of these words, without a doubt, severs them from the whole and it is patently in error for this reason.[11]

B. DOL's rebuttal regulations are not more restrictive than SSA's. This is a matter of absolute certainty if, as here, eligibility is based on blood gas studies. SSA's presumption cannot be invoked by blood gas studies. *Compare* 20 C.F.R. § 410.490(b) *with* 20 C.F.R. § 727.203(a)(3). SSA's regulations establish a separate rule for the evaluation of blood gases, under which the claimant must prove the existence of pneumoconiosis *and* the existence of qualifying blood gas values. 20 C.F.R. Part 410, Subpart D Appendix. If both facts are proven, there is a rebuttable presumption of total disability due to pneumoconiosis "in the absence of evidence rebutting such finding." *Id.* Under SSA's rule, John Taylor could not have qualified for a blood gas presumption because he does not have pneumoconiosis. DOL's rule is clearly less restrictive than SSA's in this setting.

The Fourth Circuit has, however, adopted a "collage rule" for interpreting the word "criteria" in 30 U.S.C. § 902(f)(2). Under this collage rule, the adjudicator mixes and matches DOL and SSA criteria to see if an award of benefits can be produced. Since the statutory baseline is SSA's "criteria" and not a collage, the Fourth Circuit's approach has no statutory foundation.

[11] There is no legislative material validating the Fourth Circuit's approach.

The Fourth Circuit's conclusion that DOL's rebuttal criteria are generally more restrictive than SSA's also fails on a plain language analysis. In *Pittston Coal Group*, DOL's "ten-year" invocation rule was struck down because SSA's interim presumption cross-referenced other portions of SSA's eligibility regulations making it clear that SSA did not impose an invariable ten-year rule in cases presenting x-ray, biopsy or autopsy proof of pneumoconiosis. 109 S. Ct. at 418. SSA's rebuttal rules also contain cross-references to the same set of regulations. 20 C.F.R. § 410.412(a)(1), *incorporated by reference into* 20 C.F.R. § 410.490(c)(1), (2). These cross-references were ignored by the court below, but they are significant.

Section 410.490(c)(2) contains a definition without substantive criteria.[12] The specific criteria are found by following the cross-references first to 20 C.F.R. § 410.412(a)(1) which in turn cross-references 20 C.F.R. §§ 410.424-.426. Section 410.412 defines "total disability" to mean total disability "due to pneumoconiosis." Section 410.426(a), which is incorporated into section 410.412(a)(1), further provides: "A miner shall be determined to be under a disability only if his pneumoconiosis is (or was) the primary reason for his inability to engage in such comparable and gainful work. Medical impairments other than pneumoconiosis may not be considered."

If the SSA interim presumption rebuttal rule is read in concert with the segments that are incorporated by reference, it is apparent that the SSA presumption may be rebutted by proof that the miner's disability was not "primarily" related to coal dust exposure or that the miner did not have pneumoconiosis. DOL's equivalent rebuttal provisions are within the text of DOL's interim presumption. SSA's "criteria" are discovered by following the internal references. DOL's rules

[12] At the time section 410.490(c) was promulgated by SSA, the term "total disability" was defined in section 402(f), 86 Stat. 153 (1972). This was later amended by the current 30 U.S.C. § 902(f)(1)(A).

clarify SSA's tangled rules, but DOL's rules are not more restrictive.[13]

C. The Fourth Circuit's approach presents a significant due process question. It is not reasonable to construe 30 U.S.C. § 902(f)(2) to mean that a miner with abnormal blood gas studies or ventilatory studies meeting DOL's tables is totally disabled due to pneumoconiosis as a matter of law. Neither method of scientific testing is capable of diagnosing black lung disease, and in the case of DOL's published ventilatory study tables, the listed invocation values are normal for older miners. Abnormal blood gas results may suggest a host of illnesses, or simply reflect the altitude of the testing location or the personal habits of the patient.[14] There is, in fact, little or no connection in common experience between DOL's qualifying invocation values on ventilatory or blood gas tests, and total disability or death due to pneumoconiosis.

It is one thing to permit a burden of proof shift if qualifying invocation values are established, but an entirely different matter to accord preclusive effect to presumed facts by prohibiting rebuttal. The result that flows inevitably from the decision below is that the vital link justifying an imposition of liability on the mine owner is assigned to irrelevancy. John Taylor does not suffer from black lung disease, yet the Fourth Circuit reads 30 U.S.C. § 902(f)(2) to require Clinchfield to pay benefits to Taylor on account of a totally disabling manifestation of a disease he does not have.

This Court observed, "But if a miner is not actually suffering from the type of ailment with which Congress was

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[13] At a minimum, the setting presented is not nearly clear enough to deny deference to DOL's regulatory interpretation of its mandate. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864-66 (1984).

[14] *See* A. Miller, *Pulmonary Function Tests in Clinical and Occupational Lung Disease*, 4-5, 162, 176, 186-87, 376-78 (1978); *see also Pittston Coal Group*, 109 S. Ct. at 421; *id.* at 432-33 (Stevens, J., dissenting).

concerned, there is no justification for presuming that the miner is entitled to benefits." *Mullins Coal Co. v. Director, Office of Workers' Compensation Programs*, 484 U.S. 135, 157-59 & n.30 (1987). "Lurking beneath the surface of this case is the constitutional concern that there must be 'some rational connection between the fact proved and the ultimate fact presumed.' " *Id.* at 159 n.32. (Citation omitted.)

The validity of evidentiary devices under the Due Process Clause depends " 'on the strength of the connection between the particular basic and elemental facts and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently.' " *Id.* at 158 n.30 (quoting *County Court v. Allen*, 442 U.S. 140, 156 (1979)). The court below mandates the payment of black lung benefits to a miner who does not have black lung disease. This miner produced invocation values on his tests solely because he is obese and smoked cigarettes. In no sense is Clinchfield responsible. However narrow the sweep of the Due Process Clause in an economic rights setting, Congress may not, we submit, require the transfer of money from one private party to another where the liability imposed is entirely disconnected from reality. *See Crowell v. Benson*, 285 U.S. 22, 55-56 (1932) (stating that "there is no ground for an assertion that the [employer] could constitutionally be subjected . . . to the liability which the statute creates" unless the employee's injury arose out of the employment relationship).

III.
THE PRINCIPLES INVOLVED ARE IMPORTANT

There are, at a minimum, several thousand black lung claims that will ultimately turn on the resolution of this matter. The amount at stake for the coal industry is in the neighborhood of $1 billion. Since the program envisioned by the Fourth Circuit is not in any sense a true workers' compensation program, but more closely analogous to general disability insurance, unemployment compensation or life insurance,

the benefits that would be due under such a program were never funded as a part of black lung insuring arrangements.

To the extent that benefits of this sort are funded by employers through other public programs or collectively bargained arrangements, the Fourth Circuit's decision very simply means that the employers will pay twice. There is no offsetting method available unless duplicate benefits were paid under a state workers' compensation law. *See* 30 U.S.C. § 932(g). Congress wrote a program to compensate total disability or death due to occupationally related black lung disease. The decision below departs substantially from that purpose and is in error.

CONCLUSION

This petition for a writ of certiorari should be granted. To ensure the final resolution of the important matters presented, this case should be consolidated with Nos. 89-1696, 89-1714 *and Consolidation Coal Co. v. Dayton* so that the thousands of remaining claims originally filed ten or more years ago can finally be brought to closure.

Respectfully submitted,

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